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Beyond Creativity: Copyright as Knowledge Law

Michael J. Madison*

ABSTRACT

The Supreme Court's copyright jurisprudence of the last 100 years has embraced the creativity trope. Spurred in part by themes associated with the story of "romantic authorship" in the 19th and 20th centuries, copyright critiques likewise ask, "Who is creative?" "How should creativity be protected (or not) and encouraged (or not)?" and "Why protect creativity?" Policy debates and scholarship in recent years have focused on the concept of creativity in framing copyright disputes, transactions, and institutions, reinforcing the notion that these are the central copyright questions. I suggest that this focus on the creativity trope is unhelpful. I argue that digital technologies and the explosion of amateur art challenge the usefulness of creativity as the organizing principle for copyright law. I propose that knowledge should be restored as copyright's core concept. I illustrate that argument with the art and writing of Vincent van Gogh, who is often used to illustrate the idea of the prototypically creative author, and I draw out some implications from the proposal in terms of legal doctrines that relate to producing, distributing, conserving, accessing, and sharing knowledge.

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Shepard Fairey copied a photograph of candidate Barack Obama, changed its coloring, enhanced its shading, added some campaign iconography, and created one of the singular images of the 2008 race for the American presidency: the Hope poster.¹ For his efforts, Fairey was sued for copyright infringement by the Associated Press, which claimed a copyright in the photograph.² Did the Hope poster infringe, or was it excused as a matter of fair use? Reasonable people differ.

The Fairey dispute illustrates how copyright's conceptual tools are being exhausted by the intersection of art, technology, and culture—if those tools were ever adequate to begin with. When I teach copyright law, I show the original Obama photograph and the Obama Hope poster to my students. Even before we get to a discussion of whether the former is copyrightable or the latter infringes, their reaction is this: Anyone could have produced the Obama Hope poster using some cheap or even free software. Fairey is no artist.³ And anyone could have taken the Obama photograph. How is that art?

These are intuitive reactions that precede formal legal analysis, but they point to key topics in copyright. The photograph is copyrightable if it is “original,” that is, if it constitutes “expression” of an “author.”⁴ The poster is more likely to be noninfringing if it is

1. The “Obama Hope” poster that is the centerpiece of the litigation is a derivative of a hand-finished stencil collage, which is itself based on a prior “Obama Progress” screen print produced by Fairey. See The Giant, Obama Progress, http://www.thegiant.org/wiki/index.php/Obama_Progress (last visited Apr. 9, 2010); see also The Giant, Obama Hope Stencil Collage on Paper, http://www.thegiant.org/wiki/index.php/Obama_Hope_Stencil_Collage_on_Paper (last visited Apr. 9, 2010).

2. The lawsuit and the events that led up to it are described, with copies of the relevant images, in Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 451-54 (2009).

3. In fact, Fairey is a professional artist, though he and his work are controversial. See The Giant, Shepard Fairey, http://www.thegiant.org/wiki/index.php/Shepard_Fairey (last visited Apr. 9, 2010). The students’ reaction is to the Obama Hope poster, not to the stencil collage.

4. 17 U.S.C. § 102(a) (2006).

“transformative.”⁵ On both sides of the equation, intuition and the law coincide in a search for creativity. My students are unimpressed by the creativity alleged by both sides in this case.

The conceptual exhaustion at work here is the failure of creativity as a concept to help observers differentiate things that copyright values and protects from things that copyright excludes and things that copyright penalizes. Faurey and his poster are merely notable examples. Similar difficulties afflict audio and video works, particularly those produced with inexpensive digital technology,⁶ and in so-called “fact-based” works that collect and distribute bits of data.⁷ In each of these contexts, the law struggles to deal with the core “what?” issues of copyright law: what should the law protect, and what should it not protect? In both cases, why?

To all outward appearances, creativity is the undisputed “what?” of copyright. The proposition that creativity is the very point of copyright is reflected throughout copyright doctrine. The effective scope of copyright has always been limited to an author’s “expression”⁸ and has been grounded formally since 1991 in the proposition that copyright protection attaches to any original work of authorship that displays a “modicum” of that close cousin of expression, “creativity.”⁹ Some courts require that copyrightable derivative works, adapted from earlier sources, display even larger dollops of creativity than “ordinary” works must, so that copyright law can distinguish between copyrightable new works and separately copyrightable or public domain predecessors.¹⁰ A copyrighted work is more likely to succeed against a fair use defense if the work is deemed to be “creative,” a

5. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587 (1994); *see also* 17 U.S.C. § 107 (2006).

6. *See* Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 845-46 (2009) (describing the challenges for copyright law posed by so-called “User-Generated Content”).

7. *See* Dennis S. Karjala, *Copyright and Creativity*, 15 UCLA ENT. L. REV. 169, 186-89 (2008) (criticizing use of the “creativity” framework to analyze copyrightability of numbers for fasteners).

8. “Expression” appears in quotation marks partly because the reference is to “expression” as a copyright term of art. *See* 17 U.S.C. § 102(a) (2006) (identifying the subject matter of copyright as works of authorship fixed in tangible media of expression). “Expression” as a term of art is linked closely to colloquial usage of the term “expression.” Additionally, the term “expression” appears in quotation marks to denote the distinction between the colloquial meaning of expression and the colloquial meaning of expression and the use of expression as a term of art in the Copyright Act.

9. *See* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344-47 (1991).

10. Entm’t Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1218-20 (9th Cir. 1997); Gracen v. Bradford Exch., 698 F.2d 300, 303-05 (7th Cir. 1983); *see* 17 U.S.C. § 106(2) (2006).

work accused of infringement is more likely to be acquitted as fair use if it is labeled “transformative”—that is, if it is creative.¹¹ The law’s emphasis on creativity is premised on the idea, sometimes explicit and often implicit in law, policy, and culture, that creativity is not merely an individual and a social good, but the definitive good of its intangible kind, the highest and best use to which a human mind may be put.¹² The United States Constitution links copyright with promoting “Progress.”¹³ Pursuing creativity, in the judgment of the Supreme Court, is the legal strategy that copyright adopts to achieve that goal.¹⁴

As creativity law, copyright is oversold. The ubiquity of copyright and the ubiquity of creativity suggest that society has more creativity law than it needs. It needs more of something else. I suggest that copyright should be reconsidered as a species of knowledge law.

Why? Creativity may never have been more widespread than it is today. Consider the following dose of history. Traditional hierarchies of producing, distributing, and consuming creative and expressive products were based on scarcity: the scarcity of training in the disciplines of creative production, the scarcity of access to the tools and technologies of creative production, and the scarcity of creative goods themselves.¹⁵ Viewed from the supply side, only some people could be called “artists” or “creators,” whether they were supported by patrons, by firms, or by their own labors. Only some people had access to printing presses, to paint and canvas, to movie cameras, or even to computers. Only modest numbers of copies of creative products were produced. Viewed from the consumption side, audiences and consumers collectively (if implicitly) understood all of those things; the best evidence typically lay in the work of “creativity” itself. One had

11. See *Campbell*, 510 U.S. 569.

12. That statement offers strong rhetoric, but that rhetoric is consistent with popular writing that valorizes creativity as the key to the human soul and to human prosperity and as the most complex of brain processes. See, e.g., DANIEL J. BOORSTIN, *THE CREATORS: A HISTORY OF HEROES OF THE IMAGINATION* (1992); RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* (2002); STEVEN PINKER, *HOW THE MIND WORKS* (1997).

13. See U.S. CONST. art. I, § 8, cl. 8.

14. See *Feist*, 499 U.S. at 349-50.

15. See generally Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010) (describing in greater detail the social and technological shifts to which the text refers).

only to look at the work (or to hear it) to discern the investment of creative resources that it represented.¹⁶

Today, in contrast to that stylized and condensed history, many of those sources of scarcity, if not all of them, have fallen away. Socially, culturally, and legally, the world exhibits a plenitude of creativity.¹⁷ On philosophical grounds, economic grounds, and technological grounds, it has never been easier for anyone to create, to access the tools of creation, and to make creative works accessible to enormous numbers of people, via copies and otherwise.¹⁸ “Amateur art,” which is creativity produced by all kinds of people and for all kinds of reasons, is on the rise.¹⁹ Professor Daniel Gervais characterizes amateur art as creativity that is as public and as potentially commercial as professional art.²⁰ This plenitude of

16. *Feist* itself emphasizes that a work of authorship is copyrightable if, through its appearance, it possesses minimal creativity. See *Feist*, 499 U.S. at 345; see also GRANT MCCracken, CULTURE AND CONSUMPTION 68 (1988) (concluding that an object is “an unusually cunning and oblique device for the representation of fundamental cultural truths”); Laura A. Heymann, *A Tale of (at Least) Two Authors: Focusing Copyright Law on Process over Product*, 34 J. CORP. L. 1009, 1021 (2009) (noting copyright’s insistence on evaluating the work of authorship itself). Departures from this standard are noteworthy for their infrequency. See *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) (holding in the context of pictorial, graphic, and sculptural works that copyrightability should turn on the relationship between the work and the process of industrial design).

17. The relevant world in this context is the developed Western world. Cf. Lior Jacob Strahilevitz, *Wealth Without Markets?*, 116 YALE L.J. 1472, 1497 (2007) (reviewing YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006)) (arguing that emerging forms of “social” production—a close cousin of broad “amateur” creativity—depend on the existence of excess capacity to produce possessed by individuals).

18. See YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006). Because of his commitment to liberal political philosophy, Benkler at times advances a distinctly traditional view of authorship within his manifesto for peer production. Networks are valuable, in his view, because they enable the fulfillment of the idea that all of us, as individuals, are authors of our own lives and manifest maximal autonomy with respect to our creations, i.e., our selves. See *id.* at 9. In the broad sense of determining the paths of our lives, in other words, we are all creators, all the time. See also Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1182, 1190-91 (2007) (linking the idea of individual freedom to engage in “creative play” with cultural objects with the idea of self-constitution).

19. I choose the term “amateur art” partly because it is catchier than cousins with more popular currency, such as “User-Generated Content,” and partly because it does not project the proposition that the legal and social questions that it poses are solely or even primarily economic. No term is bias-free. As “amateur art” is used in the text, the term intentionally obscures the line between the amateur artist who does not produce art for a living and the professional artist who does. The focus on amateur art evokes equally challenging questions of copyright-based line-drawing in conceptual art and appropriation art. See Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 460-62 (2008).

20. See Gervais, *supra* note 6, at 844-46.

creativity is in many ways a wonderful thing, but it comes at a cost: the work of authorship itself is no longer a reliable guide to its creative value, culturally or legally.

Shepard Fairey's Hope poster illustrates this difficulty. The poster may not be amateur art, but, as my students asked, how can one tell? The ubiquity of creativity in copyright leads lawyers, judges, scholars, and even students to investigate proxies for creativity. The "who?" of copyright substitutes for the "what?" of copyright.²¹ Who is a creator for purposes of copyright law, and how should that person or enterprise be defined and recognized, whether the topic is authors who own copyrights in the first instance, publishers and other intermediaries who distribute works of authorship, or producers of noninfringing adaptations and reuses of original works? Who among those needs the incentive to create or distribute that copyright provides? Who would create new works regardless of that incentive and, absent copyright, avoid imposing on society the social costs that accompany legal protection for creativity?²² As my students asked indirectly, is Shepard Fairey an amateur artist, or a professional? Is he an author, or is he a new user? Both? The work itself yields few clues, if any.

These are examples of "who?" analysis, which follows from the Supreme Court's minimalist approach to copyright as creativity law. As creativity has become the "what?" of copyright, pursuing creativity as copyright's subject and object has given lawyers, policymakers, scholars, and even creators themselves a weak conceptual vocabulary for addressing hard questions in the digital age. Fairey and his poster are only partly representative of the problem. The broader challenge is this: if everyone is a creator and if everything is creative, then there is little reason to dispute the conclusion that all things and all people should be well-blanketed by copyright—or that none should be. Copyright law includes a small set of tools for metering legal protection based on types of creativity,²³ but copyright's intentionally

21. The "who?" and the "how?" of creative production in traditional hierarchies may have overlapped historically with the "what?" of creativity, but today those variables often operate independently, or more independently, than in the past.

22. See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009). See generally Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008).

23. Copyright contains a handful of policy levers within the creativity construct. See, e.g., 17 U.S.C. § 107(2) (2006) (describing "the nature of the copyrighted work" as a factor to account for in fair use cases); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (establishing the idea of "thin" copyright for fact-based works).

weak way of asking “what?” has given the law a set of unsatisfying “who?” questions.

This combined weak sense of “what?” and inadequate sense of “who?” has provoked a lot of recent commentary. Some scholars have tried to refine copyright’s originality principle (the origin of the creativity trope) by referring to patent’s non-obviousness standard.²⁴ Others have sought to contextualize creativity in copyright in order to build a more robust vocabulary keyed to the “who?” and “how?” of creativity.²⁵ One scholar has proposed saving creativity by linking it more expressly to the economics of market failure.²⁶ Some scholars have sought to redefine copyright in institutional or structural terms, although that institutional premise leads to new “who?” responses. In that vein, Professor Robert Merges argues that the rise of “collective creativity,” or creativity expressed in a variety of informal group settings, suggests the need for copyright to develop a framework for “group IP rights” to accompany what he regards as copyright’s historic and appropriate solicitude for “creative professionals.”²⁷ Professor Neil Netanel argues that copyright does too much to protect professional producers and far too little to enable small creators, independents, and amateurs who contribute so much to society’s expressive diversity.²⁸

I join this group of scholars in examining the law through an institutional lens, but I offer a different premise. I do not want to save creativity. I want to marginalize it. More—more creativity, more creative goods, more creators—is not necessarily better; more is merely different. More can be socially or individually harmful; more can be wasteful.²⁹ *Creativity*, as a way to assess the strengths and weaknesses of this system and particular acts within it, and as a basis

24. See Miller, *supra* note 2, at 485. Patent law itself is tempted by the sirens of creativity. See *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007). Rejecting the notion that the “ordinary artisan” standard in patent law should be applied woodenly, leaving the door open to patents on inventions that inventors with common sense in the relevant technical art would recognize as obvious, the Supreme Court wrote, “[a] person of ordinary skill is also a person of ordinary creativity.” *Id.* at 421.

25. See generally Cohen, *supra* note 18.

26. See Karjala, *supra* note 7. For a related argument that ties a sliding originality and creativity scale in copyright to the incentives that the copyright system is meant to provide, see Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505 (2009). A broader effort to situate copyrightable creativity in an economic model defined by a limited monopoly theme is represented by Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

27. Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1187-89 (2009); Robert P. Merges, *The Concept of Property in the Digital Era*, 45 HOUS. L. REV. 1239, 1273 (2008).

28. NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 81-108 (2008).

29. See Beebe, *supra* note 15, at 69-77.

for the social organization constructed in part by copyright, cannot carry the weight it has been assigned. Even in cultural and social context, and even in the institutional proposals of Merges and Netanel, the “who?” and “how?” of copyright, the questions prompted by copyright’s focus on creativity, slight the “what?” of copyright. Instead, those questions lead to theories of behavior. Copyright as creativity law becomes a way of thinking about motivation, influence, and power, rather than a way of thinking about what sorts of things society wants to produce, preserve, share, and have access to.

I argue that the concept of *knowledge* should be rehabilitated as an anchor for copyright, and perhaps for all law dealing with products of the mind and hand.³⁰ Copyright debates often simply assume creativity as a goal.³¹ But the concept of secular creativity has little traction in law or in literature prior to the nineteenth century.³² Is there a better alternative? Can reopening the question of “what?” give copyright a better set of conceptual tools? What should the law protect, and why?³³ My answer is that although creativity should not be excluded from copyright, copyright should be conceived primarily as a system for producing, distributing, conserving, sharing, and ensuring access to knowledge.

From the standpoint of the legal system, using knowledge as a conceptual framework for copyright has some important advantages over creativity. The most important of these is that knowledge is difficult, while creativity is comparatively easy. For legal purposes, society has a reasonably good grasp of what creativity is and where creativity comes from. Creativity is the art of the new, and it is the

30. On the latter point, this piece is related to Michael J. Madison, *Creativity and Craft*, in *CREATIVITY, LAW, AND ENTREPRENEURSHIP* (Robin Paul Malloy & Shubha Ghosh eds., forthcoming 2010), and Michael J. Madison, *Notes on a Geography of Knowledge*, 77 *FORDHAM L. REV.* 2039 (2009).

31. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005) (describing copyright as an exercise in managing “a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement”); *Eldred v. Ashcroft*, 537 U.S. 186, 223 (2003) (noting that “the grant of exclusive rights to their respective writings and discoveries is intended to encourage the creativity of ‘Authors and Inventors’”).

32. See Paul Oskar Kristeller, “Creativity” and “Tradition,” 44 *J. HIST. IDEAS* 105 (1983).

33. See Diane Leenheer Zimmerman, *It’s an Original! (?)*: In Pursuit of Copyright’s *Elusive Essence*, 28 *COLUM. J.L. & ARTS* 187, 189 (2005). Neil Netanel’s recent book is an ambitious attempt to combine the “who?,” “what?,” and “why?” of copyright under the rubric of free expression principles and their connection to democratic self-government found in the First Amendment to the United States Constitution. See *NETANEL*, *supra* note 28.

product of the individual mind.³⁴ As new creativity takes form, that cognitive premise intersects with investigations into material culture and social practice, including arguments over whether people create for love or for money,³⁵ whether and when creativity is cumulative,³⁶ and whether and when creativity is collective.³⁷ Copyright gets traction at this point, both legally and culturally. It absorbs and reflects questions framed by the creativity construct. By comparison, knowledge is difficult. Philosophers have been arguing for centuries over the nature of knowledge. In the last one hundred years, their questions were joined by those of economists and sociologists.³⁸ Little of these investigations, that is, knowledge about knowledge, have made their way into copyright law, or even into intellectual property law generally.

Because knowledge is relatively difficult, copyright as knowledge law offers a landscape of opportunity. Lawmakers and policymakers can wrestle with challenging questions of line-drawing in copyright by asking and answering questions about the role of knowledge in society, rather than solely by trying to map accepted wisdom about creativity to new situations. The very fact that knowledge about knowledge is hard may, surprisingly, help policymakers find better answers to copyright's amateur art challenges than they have found so far in the comparatively easy landscape of creativity.

Part I of this Article briefly recalls the conceptual and doctrinal landscape of creativity in copyright. This material is mostly familiar to copyright lawyers and scholars, as it follows the emergence of the creativity theme in law and literature since the mid-1850s. That emergence is often connected with an argument about authorship in copyright. This Part suggests some ways in which restoring a focus on knowledge opens a conceptual landscape that is related to but distinct from the newer landscape of creativity. Part II explores the heart of the creativity/knowledge question with an illustration grounded in the authorship trope, the work of Vincent van Gogh. This Part explores

34. See, e.g., MIHÁLY CSÍKSZENTMIHÁLYI, CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION (1996); THE NATURE OF CREATIVITY: CONTEMPORARY PSYCHOLOGICAL PERSPECTIVES (Robert J. Sternberg ed., 1988).

35. See Tushnet, *supra* note 22.

36. See Cohen, *supra* note 18. The law may have a reasonably good sense of creativity, but that sense is far from perfect, or uncontested. See Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2008).

37. See Merges, *Locke for the Masses*, *supra* note 27.

38. See, e.g., FRITZ MACHLUP, THE PRODUCTION AND DISTRIBUTION OF KNOWLEDGE IN THE UNITED STATES (1962) (collecting information on the economics of the so-called knowledge industry).

what it means to put knowledge at the center of copyright law. Part III looks at copyright doctrine and its applications of copyright to amateur art and digital technology that might make more sense (or be more or less persuasive) in a framework specified by copyright as knowledge law. Part IV concludes with some implications for copyright law and scholarship.

I. FROM KNOWLEDGE TO CREATIVITY

What do I mean by the term “knowledge”? The following broad definition of knowledge serves as a starting point:

There is the philosopher’s knowledge: justified true belief, propositional knowledge, and knowledge how and knowledge of, all of which require careful delineation of justification, truth, and belief. There is the other philosopher’s knowledge, phenomenal knowledge, which is not wholly distinct from our experience of the world. Law and policy speak of knowledge in broader, looser, and more general terms, with a small “k” rather than a big “K,” perhaps. Knowledge in the small “k” sense includes information about the world and ourselves, various forms and practices of art and science (in both classical and modern senses), tools for knowing (reason and belief), as well as the diverse products of knowing. This small “k” knowledge includes fiction, film, secrets, and computer programs.³⁹

That broad beginning is needed because knowledge, in both copyright law and in public policy generally, has lived a primitive existence. Knowledge is both new and old. It is tangible and intangible, explicit and tacit.⁴⁰ Knowledge is cumulative and collective. Knowledge starts off both inside us and out in the world. Generating, distributing, storing, ensuring access to and benefiting from knowledge requires opportunity, effort, and investment. All of those things take place in suitable institutional environments, such as the environments supplied and promoted by copyright and patent law, as well as in the minds and at the hands of individuals.

Once upon a time, at the dawn of modern copyright, that institutional perspective on knowledge informed the kernel of copyright law. Policymakers referred to the scope and purpose of the law as “learning”⁴¹ and sometimes as “Science.”⁴² Those terms, while

39. See Madison, *Notes on a Geography of Knowledge*, *supra* note 30, at 2043.

40. For discussion of distinctions among tacit and explicit knowledge, and conceptual and tangible knowledge, see, e.g., Dan L. Burk, *The Role of Patent Law in Knowledge Codification*, 23 BERKELEY TECH. L.J. 1009 (2008); Robin Cowan, Paul A. David & Dominique Foray, *The Explicit Economics of Knowledge Codification and Tacitness*, 9 INDUS. & CORP. CHANGE 211 (2000); Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 CASE W. RES. L. REV. 381 (2005).

41. “Learning” as copyright’s framework comes from the Statute of Anne, which begins with the following preamble: “An Act for the Encouragement of Learning, by Vesting the Copies

a little archaic, are helpful in the present context, particularly because they suggest that the idea of copyright as knowledge law is grounded initially in copyright's origins in the Statute of Anne⁴³ and the United States Constitution.⁴⁴ Knowledge as it is described above is a modern analog, though not quite a synonym. Eighteenth and early nineteenth century copyright was limited in scope and modest in ambition. English statutory copyright began with books; in the United States, the first copyright statute covered maps, charts, and books.⁴⁵ Copyright began as a mechanism to ensure that authors and publishers had an economic motivation to teach people about their world: who and where they were, where they had come from, and where they were going, both literally and metaphorically.⁴⁶ The word "teach" is used intentionally. Copyright's teaching function was shared by patent law. Even today, patent retains a strong connection to its own roots as a species of knowledge law, by insisting that patents may be granted on inventions so long as the patent specification adequately "teaches" relevant technological disciplines how to practice the advance that is to be patented.⁴⁷

Modern scholars and even modern courts have not forgotten copyright's knowledge roots—at least not entirely. In *Harper & Row, Publishers v. Nation Enterprises*, the Supreme Court noted that "copyright is intended to increase and not to impede the harvest of knowledge."⁴⁸ In a recent article, Professor Peter Menell traced the history of copyright as a species of knowledge law in analyzing

of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

42. The Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST., art. I, § 8, cl. 8.

43. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

44. U.S. CONST. art. I, § 8, cl. 8. Continental copyright systems, whose solicitude for authors is often contrasted with the economic orientation of Anglo-American copyright, was likewise grounded initially in the concept of knowledge. See generally Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991 (1990) (contrasting early American and French copyright systems).

45. The works most frequently registered in copyright in early America were textbooks, manuals, atlases, and directories. See James Gilreath, *American Literature, Public Policy, and the Copyright Laws Before 1800*, in FEDERAL COPYRIGHT RECORDS 1790-1800, xv, xv (James Gilreath ed., 1987). Copyright's "useful" origins are recounted in Bracha, *supra* note 22, at 209-24.

46. See Dotan Oliar, *The (Constitutional) Convention on IP: A New Reading*, 57 UCLA L. REV. 421 (2009).

47. See 35 U.S.C. § 112 (2006); *In re Wright*, 999 F.2d 1557, 1561 (Fed. Cir. 1993) (noting that "to be enabling, the specification of a patent must teach those skilled in the art how to make and use the full scope of the claimed invention without 'undue experimentation'").

48. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985).

Google's Book Search digitization project.⁴⁹ Professor Pamela Samuelson used a different meaning of knowledge in analyzing the seminal case of *Baker v. Selden*,⁵⁰ often cited for the proposition that copyright protects expression but not ideas, as a translation of the principle that copyright cannot be used to monopolize knowledge.⁵¹ But most observers have tended to take copyright's contemporary relationship to knowledge for granted, pausing at the concept on their way to bigger prey like "progress"⁵² and "expression."⁵³ Beyond copyright, decades of policymaking have not refined the relationship between law and knowledge. Modern policymakers develop and rely on new knowledge-based catchphrases—the knowledge economy,⁵⁴ traditional knowledge,⁵⁵ and access to knowledge⁵⁶—with little settled understanding of what they mean or what questions they are meant to pose or answer.

Given this background, how did copyright become a law of creativity? In a history that is now familiar to copyright lawyers, what is sometimes called the authorship critique displaced knowledge as the governing framework for copyright law and, over the course of a century, replaced it with creativity. Some of the transition owes its origins and progress to an ideology of creative authorship that developed among nineteenth-century critics who advocated for

49. See Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013 (2007). Menell's approach is grounded in an account of the legal system's historical affinity for knowledge preservation and access to knowledge. See *id.* at 1019-39.

50. *Baker v. Selden*, 101 U.S. 99 (1880).

51. See Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921 (2007).

52. See *Eldred v. Ashcroft*, 537 U.S. 186, 223 (2003) (noting that the grant of exclusive rights for limited times serves "the ultimate purpose of promoting the 'Progress of Science and useful Arts'"); Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993) (arguing that the constitutional purpose of copyright should be guided by the importance of access to knowledge as a fundamental value).

53. See L. Ray Patterson & Stanley F. Birch, Jr., *A Unified Theory of Copyright*, 46 HOUS. L. REV. 215 (2009). Lawrence Lessig's recent popular manifesto, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004), which rhetorically conflates knowledge, creativity, culture, and expression as objects and subjects of copyright, is a helpful example.

54. See *Communication from the Commission: Copyright in the Knowledge Economy*, COM (2009) 532 final (Oct. 19, 2009), available at http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20091019_532_en.pdf.

55. See Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37 (2009).

56. See Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

expanded legal protection for authors.⁵⁷ Some of the transition owes its origins to enterprises advancing a legal agenda framed by a creativity-based concept of originality, in order to bury authors, so to speak, rather than to praise them.⁵⁸ Justice Story's opinion in *Folsom v. Marsh*,⁵⁹ establishing the rudiments of the modern fair use doctrine, has been characterized in those terms, as has the Supreme Court's more recent opinion in *International News Service v. Associated Press*,⁶⁰ which established the "hot news" misappropriation doctrine as a limited exception to the exclusion of facts from copyright. Importantly, *International News Service* drew a distinction between the news and the literary form in which it was expressed.⁶¹ In that case, as well as in *Burrow-Giles Lithographic Co. v. Sarony*,⁶² and *Bleistein v. Donaldson Lithographing Co.*,⁶³ the Court effectively defined copyright as creativity law, both technically (in terms of the "authorship" that Congress was authorized to protect through copyright) and rhetorically.⁶⁴

The case that represents the apotheosis of copyright as creativity law is *Feist Publications v. Rural Telephone Service*.⁶⁵ According to the Court in *Feist*, the subject matter of copyright is broad, that broad field is defined by an author's creativity, and virtually no true creativity is required to qualify a work as copyrightable. Originality is a constitutional requirement, the Court held, and "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal

57. See Carla Hesse, *The Rise of Intellectual Property, 700 B.C.-A.D. 2000: An Idea in the Balance*, DAEDALUS, Spring 2002, at 26, 35; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 459 (1991); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425 (1984), reprinted in THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 49-55 (1994).

58. See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

59. See L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 434-35 (1998).

60. 248 U.S. 215 (1918).

61. See Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate over Copyright in News*, 27 CARDOZO ARTS & ENT. L.J. 321, 370 (2009).

62. 111 U.S. 53 (1884).

63. 188 U.S. 239 (1903).

64. See *Burrow-Giles*, 111 U.S. at 58 (characterizing "writings" in the constitutional authorization to enact a copyright statute as all forms "by which the ideas in the mind of the author are given visible expression"); see also *Bleistein*, 188 U.S. at 250 ("The copy [the original work] is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone.").

65. 499 U.S. 340 (1991).

degree of creativity.”⁶⁶ *Feist*’s discussion of creativity is technically dicta, but *Feist* has nonetheless made it effectively mandatory for policymakers and advocates to frame copyright arguments in creativity terms. The *minimal* creativity threshold ensures that those arguments are constrained meaningfully in few ways.⁶⁷ Facts and ideas themselves remain beyond copyright’s pale;⁶⁸ in that sense there is a synthesis of copyright as creativity law (facts and ideas are not “creative”) and copyright as knowledge law (facts and ideas form a body of knowledge that remains free to all). Is a *compilation* of fact, the work at issue in *Feist*, protectable by copyright? The statute provides that it is, so long as the underlying materials are “selected, coordinated, or arranged” in a way that is original—that is, minimally creative.⁶⁹

But “creativity” in *Feist*’s sense gives advocates and courts few tools for distinguishing what is, and what is not, creative. Creativity is mostly binary, and as a legal standard, that binary is substantively impotent. Works pass the creativity threshold if they reflect anything beyond standard or automatic selections, and if they rely on non-functional considerations.⁷⁰ Creativity therefore misleads. Particularly in compilation cases, the focus on creativity leads advocates and courts into positions where creativity plays both a rhetorical role and a substantive role that is divorced from the competition concerns that are characteristically driving these cases.⁷¹

Though *Feist* deals with copyrightable subject matter, creativity themes in fair use cases and in cases involving derivative works suffer comparable weaknesses. In fair use case law, which now emphasizes the “transformative” character of works accused of infringement, courts perform legal contortions to persuade themselves that verbatim reproductions of copyrighted works are transformative.⁷² The Seventh Circuit Court of Appeals has retreated from its earlier statement that a derivative work may be protected by

66. *Id.* at 345.

67. See Zimmerman, *supra* note 33.

68. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347-49 (1991).

69. See 17 U.S.C. §§ 101 (definition of compilation), 103 (2006).

70. See Karjala, *supra* note 7, at 185-200.

71. See *id.*

72. See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (holding that the defendant’s use of the plaintiff’s copyrighted concert poster images in a book collecting and critiquing the artworks was “transformatively different from the images’ original expressive purpose”); see also Diane Leenheer Zimmerman, *The More Things Change the Less They Seem “Transformed”: Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC’Y U.S.A. 251 (1998).

copyright only if it displays a heightened measure of originality.⁷³ Nearly anything can be creatively original, even a derivative work, and nearly anything can be transformative. In amateur art and digital contexts, creativity is incapable of performing the institutional and structural functions that scholars of nearly all stripes believe copyright should perform⁷⁴—distinguishing what should be protected and encouraged from what should or need not be. Yet copyright as creativity law has become so all-encompassing that even skeptics of copyright's modern expansion have adopted it in the name of the Creative Commons movement and licensing scheme.⁷⁵

If creativity has exhausted itself conceptually, why turn to knowledge as a complement, if not a substitute? History and tradition are useful starting points. Copyright began as knowledge law,⁷⁶ and knowledge law it should remain. Congressional power to devise copyright and patent law remains tied to the goal of promoting "Progress of Science and the Useful Arts."⁷⁷ History and tradition are also guides to copyright as knowledge law in normative terms. Law and culture may have lurched toward creativity, but knowledge as a normative subject and object did not change. The normative power of the thinking that went into the first copyright statutes, for example, remains undiminished. In the words of George Washington: "Knowledge is in every country the surest basis of public happiness. In one in which the measures of government receive their impression so immediately from the sense of the community as in ours, it is proportionately essential."⁷⁸

Washington was making an instrumental claim about the relationship between knowledge and democratic self-government that echoes today both in the intuition that culture and governance are tied to one another and, more concretely, in Professor Netanel's work on the role of copyright in American democracy.⁷⁹ The normative value of knowledge might be instrumental in an entirely different sense. Even

73. See *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513 (7th Cir. 2009). The court rejected the proposition that derivative work copyrights are subject to a "heightened originality" standard, usually associated with *Gracen v. Bradford Exchange*, 698 F.2d 300 (7th Cir. 1983), but preserved the proposition that derivative work copyrights subsist only in works that display a "distinguishable variation" from their source.

74. See *supra* notes 27-28 and accompanying text (describing prescriptions of Robert Merges and Neil Netanel).

75. See Creative Commons, <http://creativecommons.org/> (last visited Apr. 9, 2010).

76. See *supra* notes 41-46 and accompanying text.

77. U.S. CONST. art. I, § 8, cl. 8.

78. See *Patterson & Birch, Jr.*, *supra* note 53, at 229-30 (quoting George Washington).

79. See NETANEL, *supra* note 28, at 105-06 (building the promotion of knowledge into his model of copyright and the First Amendment).

if knowledge were not tied specifically to self-governance, the Baconian tradition of experimental science aligned knowledge with improving the human condition, a premise that informs both modern copyright and patent law.⁸⁰ As Professor William Fisher has explored in the context of the fair use doctrine, ethical claims tie knowledge (in Fisher's argument, framed as education) to a broad range of conceptions of the good life.⁸¹ The virtue of knowledge need not be instrumental. Long-standing philosophical traditions lay claims to knowledge as a good in itself.⁸²

This argument does not rest solely on the claim that knowledge should be idealized as a good in itself; rather, it embraces the normative value of knowledge both as a good in itself and as something that can be shared and used. The argument in total can be recast as the proposition that copyright should be informed by its status as knowledge law because individuals ought to be seeking knowledge for themselves and ought to be producing, distributing, sharing, storing, and conserving knowledge so that others can know. This *ought* includes knowledge of the self, knowledge of others, knowledge of the world, and, importantly, knowledge of things that are not yet known.⁸³ Not all knowledge is good knowledge;⁸⁴ knowledge can cause harm, and confidentiality and secrecy are valid normative goals under some circumstances. At bottom, however, it is the case that copyright's historical resonance with knowledge has a normative basis that is independent of history and tradition.

If copyright as creativity law offers a weak conceptual vocabulary for analyzing the issues that copyright has been tasked with, and if copyright as knowledge law has a defensible historical basis and a strong normative foundation, then does copyright as knowledge law offer a strong conceptual vocabulary? It has the potential to do so. To make copyright work as a species of knowledge law, policymakers, judges, lawyers, and scholars—not to mention individuals, groups, and firms participating in activities that engage

80. See Edward C. Walterscheid, *To Promote the Progress of Useful Arts: American Patent Law and Administration, 1787-1836 (Part 2)*, 80 J. PAT. & TRADEMARK OFF. SOC'Y 11, 35 (1998).

81. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1709-10 (1988).

82. See Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2031-32 (2009) (describing the normative benefits of the knowledge embodied in mechanical inventions, whether or not they are commercialized).

83. In other words, the normative value of knowledge lies in what is unknown, and what society searches for, as much as it lies in what is known.

84. For an interesting analysis of the virtues of ignorance, see Christian Turner, *The Burden of Knowledge*, 43 GA. L. REV. 297 (2009).

copyright questions—have to generate that vocabulary by exploring a range of conceptual issues and questions. Knowledge, in other words, is difficult.⁸⁵ The concept of knowledge both offers and requires answering a wide range of questions about how that concept should be translated into policy, doctrine, and practice. Those questions include the following:

The language of knowledge law: The dominant metaphor for intellectual property today is ownership.⁸⁶ When and how can knowledge be owned? By whom? Why and how? A related metaphorical issue surrounds the origins and destinations of intellectual property. Where does knowledge come from, and how is it used? Copyright as knowledge law may open a broader space for discussion and acceptance of the arguably cumulative and collective character of intellectual works. The cumulative character of creativity is often justified rhetorically but inadequately with a reference to a quotation usually attributed to Isaac Newton: “If I have seen further, it is by standing on the shoulders of giants.”⁸⁷ Both the quotation itself and its historical context refer not to creativity but to knowledge and scholarship.⁸⁸

The objects of knowledge law: Should the law be oriented to knowledge “goods”—that is, what copyright refers to as works of authorship? Assuming that it should, how are knowledge goods defined? Who defines them? Should knowledge law preserve the law’s current distinction between unprotectable abstract knowledge and protectable expression? Between intangible knowledge and tangible objects? All of these (tangible and intangible, idea and expression) are forms of knowledge. What knowledge *counts*, and when? Is there a more productive classification to be found among types of knowledge, such as distinctions among propositional knowledge (knowledge of *what*), prescriptive knowledge (knowledge of *how*), and knowledge of social facts and phenomena.⁸⁹ What histories and contexts of knowledge matter? What is the relationship between creativity and knowledge, assuming that creativity should not be ejected or excluded from copyright, but re-established within it? These are questions that copyright as creativity law has tried to avoid. Other areas of law and practice that traffic in knowledge of different types—evidence law, securities law, defamation law, and public funding of scientific research, for example—have developed ways to differentiate among types of knowledge.⁹⁰ Should the law revisit

85. See *supra* notes 34-38 and accompanying text.

86. See, e.g., Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J.L. & TECH. 321 (2009) (focusing on the idea of an intellectual property as a right to exclude, independent of the regulatory context in which that right exists).

87. See, e.g., Ruth L. Okediji, *The Regulation of Creativity Under the WIPO Internet Treaties*, 77 FORDHAM L. REV. 2379, 2410 (2009).

88. The definitive account of the quotation and its pre-Newtonian origins is ROBERT K. MERTON, *ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT* (Univ. of Chi. Press 1993) (1965). The affinity of patent scholars for Newton is well-known. See, e.g., Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29 (1991).

89. See JOEL MOKYR, *THE GIFTS OF ATHENA: HISTORICAL ORIGINS OF THE KNOWLEDGE ECONOMY* 2-4 (2002). The categories demonstrate the possibility of constructing a meta-analysis of knowledge that keys into various intellectual property disciplines. These are not the only categories of knowledge or necessarily the right ones.

90. Evidence law allows some knowledge to be considered by fact-finders, and it excludes other knowledge. Securities law regulates the types of knowledge that may be shared among buyers and sellers of securities. Defamation law punishes the public disclosure of certain kinds of knowledge. Governments fund the production of what it believes to be desirable scientific and artistic knowledge. For an interesting account of the relationships that law constructs among

its long-standing reluctance to distinguish between types of knowledge objects in the context of copyright, that is, the so-called non-discrimination principle, based on intrinsic attributes of different types of knowledge, or the purposes of different types of knowledge, or some other variables?⁹¹ How should appreciation for the purely aesthetic be situated in a legal vocabulary geared to knowledge? (The impurely aesthetic, or crafts as well as arts, deserve notice as well.) Art as knowledge, that is, as a way of knowing ourselves and the world, is a concept with a respectable historical pedigree; the concept is ripe for rehabilitation and elaboration in the context of intellectual property law.⁹²

Controlling and sharing knowledge: What are the rights and obligations of those who control knowledge and knowledge goods? How might rights and obligations vary across different types of knowledge objects? Across different types of individuals, groups, communities, and firms? Should knowledge law more specifically and consistently address questions concerning social relationships constructed around knowledge, concerning access to knowledge, and concerning conservation and storage of knowledge and knowledge objects than intellectual property does today? Some intellectual property scholars have begun efforts to investigate those questions,⁹³ but they struggle against the paradigm of copyright as creativity law.

Context: How should the law investigate the social, cultural, and material contexts, including institutional and other economic contexts and systems, in which knowledge is produced, stored, distributed, shared, accessed, and used?⁹⁴ When and how should information about context inform conclusions drawn as to knowledge law issues concerning access and control, and individual and communal or collective interests?

Integrating disparate intellectual property doctrines: Could constructing a vocabulary of copyright as knowledge law offer the potential to connect copyright doctrines more thoughtfully to other intellectual property doctrines and related domains than is typically possible today? Copyright as creativity law appears to have little to do with patent law or trademark law, or with questions of privacy, public health, or traditional knowledge (TK) and traditional cultural expression (TCE). Patent law, in particular, is often characterized as the law of useful knowledge, and, as a result, it wrestles with its

apparently disparate areas of what I call knowledge law, see JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996).

91. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

92. See Carl H. Hamburg, *Art as Knowledge*, 12 COLLEGE ART J. 2 (1952); Harry Levin, *Art as Knowledge*, in HARRY LEVIN, CONTEXTS OF CRITICISM (1957), at 2; Henry P. Raleigh, *Art as Communicable Knowledge*, 5 J. AESTHETIC ED. 115 (1971); Ralph Ross, *Art as Knowledge*, 69 SEWANEE REV. 579 (1961).

93. See Kapczynski, *supra* note 56, at 820; Menell, *supra* note 49, at 1018; Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257 (2006). On the challenges facing access movements as they confront authorship and creation narratives, see Jessica Silbey, *Comparative Tales of Origins and Access: A New Future for Intellectual Property*, 61 CASE W. RES. L. REV. (forthcoming 2010).

94. Much of the contextual analysis that Professor Julie Cohen recommends with respect to copyrightable creativity belongs here, as applied to knowledge. See Cohen, *supra* note 18. Institutional claims such as those raised by Professors Merges and Netanel, see *supra* notes 27-28 and accompanying text, can be assessed here as well. Professor Beebe answers his own critique of the cultural hierarchies produced by intellectual property law by pointing to the redemptive possibilities in what Professors Brett Frischmann, Katherine Strandburg, and I have called commons in the cultural environment. See Beebe, *supra* note 15, at 994-87; Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010). Professor Madhavi Sunder has rightly urged reconsideration of questions of wealth, power, and status in the context of intellectual property law generally, as part of an overall appreciation of the social relationships that property law builds, and is built upon. See Sunder, *supra* note 93, at 315-19.

own subject matter demons.⁹⁵ These fields all may be related as species of knowledge law. A richer, common vocabulary might help policymakers make better sense of overlaps and inconsistencies.

That is a non-exclusive list, and it lacks detail.⁹⁶ It is certainly possible that these questions and issues might be raised in copyright contexts and that the flow of scholarship, policymaking, and litigation would produce a thin conceptual vocabulary that is no better than what exists today. But it is difficult to imagine that such a vocabulary would be worse, and given the freshness of the amateur art and digital production issues noted in the Introduction, the time seems right to explore the possibility.

The next two Parts initiate some of that exploration, taking some of these broad ideas and making them more concrete. Part II looks backward, taking up an older example of artistic borrowing that offers an echo of the Associated Press's contemporary claim against Shepard Fairey. The point of this example is that the connection between amateur art and digital production is new, but it has precedent in the history of art, and precedent that speaks to the broader discussion of creativity and knowledge. A transition from copyright as creativity law to copyright as knowledge law need not represent a sudden departure from copyright's past—even its nineteenth century "romantic authorship" past. That past offers some potentially productive ways of looking at a knowledge future. Part III looks at recent cases, suggesting that copyright as knowledge law may offer some immediate and tangible benefits in the context of current disputes.

II. FROM CREATIVITY TO KNOWLEDGE

It is hardly satisfying to claim that copyright could be conceptualized as a species of knowledge law and conclude by identifying questions, rather than answers, with respect to what that might mean in practice. In this Part and the next, I offer some examples from history and current experience, returning to the questions of amateur art and digital production. How does copyright as knowledge law contribute to a better understanding of those issues?

For a historical example, consider the Dutch painter Vincent van Gogh. As one of the great painters of the nineteenth century, van Gogh is sometimes cited as the model of the romantic author that

95. See John R. Thomas, *The Patenting of the Liberal Professions*, 40 B.C. L. REV. 1139, 1141 (1999).

96. For more detailed justifications of inquiries into several of these issues, see Madison, *Notes on a Geography of Knowledge*, *supra* note 30, at 2040.

many scholars argue shaped copyright law over the last one hundred years, a mostly solitary artistic genius who was inspired to create by the glories of nature rather than the prospect of financial reward.⁹⁷ Van Gogh succeeded in producing a body of supremely creative work,⁹⁸ even if the paintings themselves sold badly until van Gogh was discovered posthumously. *The Starry Night*, painted in 1889, exemplifies this theme; it is associated with van Gogh's direct, emotional, and highly imaginative sense of nature. Van Gogh's letters to his brother Theo offer the artist's own insights into his work:

[T]he sight of the stars always makes me dream in as simple a way as the black spots on the map, representing towns and villages, make me dream. [¶] Why, I say to myself, should the spots of light in the firmament be less accessible to us than the black spots on the map of France.⁹⁹

It may be surprising to many legal scholars, therefore, to learn that van Gogh was a copyist, and a repeated and intentional copyist at that, even during his later years, when he produced *The Starry Night*, as well as other works that are now regarded as Expressionist masterpieces. Some intellectual property scholars have noted one particular feature of van Gogh's experience as a copyist: his reworking in oils of Japanese woodcut prints by Utagawa Hiroshige.¹⁰⁰ The lawyer and scholar Paul Geller, weaving van Gogh's borrowing from Hiroshige into a discussion of the scope of copyright claims, notes that van Gogh's studies of Hiroshige were unambiguously and creatively new: "From one's prints to the other's studies, composition goes from static to dynamic, coloration from muted to emphatic, and emotional tone changes altogether."¹⁰¹

97. See BOYLE, *supra* note 90, at 91-92.

98. Arthur Koestler famously wrote that "Einstein's space is no closer to reality than Van Gogh's sky" as a way of expressing the sense that scientists and artists are alike in their use and exploration of the human imagination. ARTHUR KOESTLER, *THE ACT OF CREATION* 252 (1964).

99. Letter from Vincent van Gogh to Theo van Gogh, Arles (Monday, July 9 or Tuesday, July 10, 1888), in VINCENT VAN GOGH: *THE LETTERS* (Leo Jansen, Hans Luijten & Nienke Bakker eds., 2009), available at <http://vangoghletters.org/vg/letters/let638/letter.html>. The original of *The Starry Night* is in the collection of the Museum of Modern Art in New York, which makes the connection between the quotation in the text and this painting at Museum of Modern Art, Vincent van Gogh, *The Starry Night*, http://www.moma.org/collection/browse_results.php?object_id=79802 (last visited Apr. 9, 2010).

100. See Paul Edward Geller, *Beyond the Copyright Crisis: Principles for Change*, 55 J. COPYRIGHT SOC'Y U.S.A. 165, 180 (2008); Paul Edward Geller, *Hiroshige v. Van Gogh: Resolving the Dilemma of Copyright Scope in Remediating Infringement*, 46 J. COPYRIGHT. SOC'Y U.S.A. 39, 40 (1998).

101. See Geller, *Beyond the Copyright Crisis*, *supra* note 100, at 180-81. Geller does not hold himself out as an art critic, so his judgments should be taken as useful anecdotes. I have seen van Gogh's studies and Hiroshige's prints side by side. While van Gogh clearly was engaged in reworking, and his paintings are not copies of Hiroshige's prints, my own anecdotal reaction is that it is difficult to say that van Gogh projects a dynamism, emotional tone, and sense of color

I focus on a less-noted part of van Gogh's experience—his copying of paintings by the French Realist Jean-François Millet—and on how van Gogh himself described the process and the meaning of what he was doing. In van Gogh's words, a modern scholar may hear echoes of a creative imagination at work, but van Gogh himself may have thought that he was up to something else—something closer to what I mean by offering as a copyright theme, and something that may be helpful in considering amateur and digital art.

Millet himself was a celebrated and successful painter of the mid-nineteenth century who was (and remains) well-known for his true-to-life portraits of peasant life.¹⁰² Millet painted oils, he drew, and he produced woodcuts. Van Gogh, working twenty to thirty years after Millet, copied his paintings and prints, over and over again. Between 1889 and 1890, during van Gogh's residence in Saint-Rémy and around the same time that van Gogh painted *The Starry Night*, he produced more than twenty paintings of countryside and peasant scenes which he titled, in part, "After Millet"¹⁰³—that is, which continued both van Gogh's long-standing fascination with Millet, and the Realism found in van Gogh's earliest works.

What was van Gogh doing? Primarily, van Gogh's paintings were studies.¹⁰⁴ Van Gogh's paintings are not reproductions of Millet's paintings and prints, but, unlike his studies of Hiroshige, they are not adaptations of one genre into another. Millet was a Realist; van Gogh emulated his Realism. Subject, composition, tone, and coloration vary between the two artists, but sometimes subtly. (Some of Millet works that van Gogh copied were prints, in black and white; some of the Millet works were paintings.) Some of van Gogh's studies vividly evoke the Expressionism on display in *The Starry Night*; some less so.¹⁰⁵ It is tempting to characterize van Gogh's use of Millet as Geller characterizes van Gogh's use of Hiroshige, as a modern artist bringing an older reference to life. That argument is seeded with notions of creativity. Van Gogh was creating. He was also, and more

that is more impressive than that of Hiroshige. Once we set aside a subconscious sense that van Gogh was a magnificent and original creator, my own sense is that van Gogh's studies are neither more nor less creative than Hiroshige's prints.

102. See ALEXANDRA R. MURPHY ET AL., *JEAN-FRANÇOIS MILLET: DRAWN INTO THE LIGHT* 1 (1999).

103. A helpful inventory of van Gogh's studies of Millet, with links to images of both Millet's and van Gogh's paintings, is available at Vincent van Gogh: Influences, <http://www.vggallery.com/influences/millet/main.htm> (last visited Apr. 9, 2010).

104. See *infra* notes 106-108 and accompanying text.

105. The characterizations of van Gogh, Millet, and Hiroshige in this paragraph are based on my own viewing of original works at the Van Gogh Museum in Amsterdam in October 2009.

importantly, practicing. In his own words, he was learning, and he was teaching.

Excerpts from van Gogh's contemporaneous letters to his brother Theo are revealing:

What you say about the copy after Millet, The evening, pleases me. The more I think about it the more I find that there's justification for trying to reproduce things by Millet that he didn't have the time to paint in oils. So working either on his drawings or the wood engravings, it's not copying pure and simple that one would be doing. It is rather translating into another language, the one of colours, the impressions of chiaroscuro and white and black. In this way I've just finished the three other 'times of the day' after the wood engravings by Lavielle. It took me a lot of time and a lot of trouble. . . .

[O]nce you have them you'll clearly see that they were done through a most profound and sincere admiration for Millet. Then, even if they're criticized one day or despised as copies, it will remain no less true that it's justifiable to try to make Millet's work more accessible to the ordinary general public. . . .

This week I'm going to start on Millet's 'Snow-covered field' and 'First steps' in the same format as the others. Then there'll be 6 canvases forming a series, and I assure you that I've worked on them, these last three of the 'Times of the day', with much thought to calculate the colour.

You see, these days there are so many people who don't feel made for the public but who support and consolidate what others do. Those who translate books, for example. The engravers, the lithographers. Take Vernier, for example, and Lerat. So that's to say that I don't hesitate to make copies. If I had the leisure to travel, how I'd like to copy the works of Giotto, this painter who would be as modern as Delacroix if he weren't primitive, and who's so different from the other primitives. I haven't seen much of his work, though. But there's one who is consolatory.¹⁰⁶

And in another letter to Theo:

I can assure you that it interests me enormously to make copies, and that not having any models for the moment it will ensure, however, that I don't lose sight of the figure.

What's more, it will give me a studio decoration for myself or another.

I would like also to copy the Sower and the Diggers.

There's a photo of the Diggers after the drawing.

And Lerat's etching of the Sower at Durand-Ruel's.

In these same etchings is the Field under the snow with a harrow. Then The four times of the day, there are examples of them in the collection of wood engravings.

I would like to have all of this, at least the etchings and the wood engravings. It's a study I need, for I want to *learn*. Although copying may be the *old* system, that absolutely doesn't bother me at all. I'm going to copy Delacroix's Good Samaritan too. . . .

What I'm seeking in it, and why it seems good to me to copy them, I'm going to try to tell you. We painters are always asked to *compose* ourselves and *to be nothing but composers*.

106. Letter from Vincent van Gogh to Theo van Gogh, Saint-Rémy-de-Provence (on or about Monday, Jan. 13, 1890), in VINCENT VAN GOGH: THE LETTERS, *supra* note 99, available at <http://vangoghletters.org/vg/letters/let839/letter.html>.

Very well—but in music it isn't so—and if such a person plays some Beethoven he'll add his personal interpretation to it—in music, and then above all for singing—a composer's *interpretation* is something, and it isn't a hard and fast rule that only the composer plays his own compositions.

Good—since I'm above all ill at present, I'm trying to do something to console myself, for my own pleasure.

I place the black-and-white by Delacroix or Millet or after them in front of me as a subject. And then I improvise colour on it but, being me, not completely of course, but seeking memories of *their* paintings—but the memory, the vague consonance of colours that are in the same sentiment, if not right—that's my own interpretation.

Heaps of people don't copy. Heaps of others do copy—for me, I set myself to it by chance, and I find that it teaches and above all sometimes consoles.¹⁰⁷

And finally:

One must—it is true—believe in it a little from time to time in order to see it. If, for myself, I wanted to continue, let's call it TRANSLATING certain pages of Millet, then in order to prevent people, not criticizing me, I couldn't care about that, but bothering or obstructing me under the pretext that I'm manufacturing copies—then among the artists I need people like Russell or Gauguin to carry this task to a successful conclusion, to make something serious of it. To do the things by Millet that you sent, for example, the choice of which I consider completely right—I have scruples of conscience, and I took the pile of photographs and I sent them unhesitatingly to Russell so that I shouldn't see them again until I'd thought long and hard about it. I don't want to do it before first having heard something of your opinion, then also that of certain others on those that you'll soon receive. Without that I'd have scruples of conscience, a fear that it might be plagiarism.¹⁰⁸

In light of this evidence, it is tempting to set a hypothetical claim by Millet against van Gogh, and by van Gogh against a downstream copyist, in the context of modern copyright law. Did van Gogh infringe Millet? (Precisely, would van Gogh's work have infringed Millet's hypothetical copyrights?) Is van Gogh's work excused under the rubric of fair use? Has van Gogh produced versions of Millet that are sufficiently original that they may be protected by copyright as derivative works? My view is that the answers to these questions are “no,” “yes,” and “yes,” respectively, but, as is often the case, reasonable minds may differ. In the late nineteenth century, Millet was better known than van Gogh, and van Gogh's early Expressionism had not yet found a critical audience.¹⁰⁹ Had van Gogh

107. Letter from Vincent van Gogh to Theo van Gogh, Saint-Rémy-de-Provence (on or about Friday, Sept. 20, 1889), in VINCENT VAN GOGH: THE LETTERS, *supra* note 99, available at <http://vangoghletters.org/vg/letters/let805/letter.html>.

108. Letter from Vincent van Gogh to Theo van Gogh, Saint-Rémy-de-Provence (Saturday, Feb. 1, 1890), in VINCENT VAN GOGH: THE LETTERS, *supra* note 99, available at <http://vangoghletters.org/vg/letters/let850/letter.html>.

109. Art historians studying van Gogh's copies of Millet appear united in their judgment that van Gogh was both self-conscious and innovative in his use of Millet, well-known as an artist, both for his own training, and for the purpose of eventually bringing his own paintings to a popular audience. *See generally* CHARLES CHETHAM, THE ROLE OF VINCENT VAN GOGH'S COPIES

been more successful in marketing his work, including his copies of Millet, contemporary judgment (again, if modern copyright standards were applied) might well have favored Millet, the creator, against van Gogh, the copyist. Even a modern assessment does not clearly favor van Gogh, though the twentieth century has been especially kind to van Gogh the creator. If van Gogh were to prevail in modern terms, and possess a valid copyright in his own work, the route to that result would run through copyright as creativity law. The excerpt above from Paul Geller's article, commenting on the relative creativity observed in the work of van Gogh and Hiroshige,¹¹⁰ is representative of that argument.

Van Gogh's own epistolary testimony suggests a somewhat different and perhaps clearer route to vindicating van Gogh and to understanding what he was doing—one that sounds, or at least echoes, in copyright as knowledge law. It is possible to extract several important points from the long quotations above.

The first point is that van Gogh himself may not have conceived of his work as part of what has become known as the authorship movement of the late eighteenth and nineteenth centuries. There is no doubt that self-expression was among van Gogh's highest priorities, yet there is a conspicuous absence of the philosophy, grounded in literature, that characterized the author's work as a distinct intangible thing deserving of legal protection.¹¹¹ Van Gogh was hardly ignorant of artists' ethical interests; he went to some lengths to distinguish his efforts from those of a copyist, or a plagiarist.¹¹² Van Gogh regarded himself, after all, as an artist.¹¹³ He did not idealize or romanticize what was happening. He was practicing, and training, as artists do.

The second point is that van Gogh focused simultaneously on himself as an artist, and on his audience. Van Gogh was not commercially successful during his lifetime, but that does not mean that he was indifferent to (and did not paint in anticipation of) making money from his work or having his work seen and understood. Note the references in his letters to his use of Millet in the context of

IN THE DEVELOPMENT OF HIS ART (1976); CORNELIA HOMBURG, *THE COPY TURNS ORIGINAL: VINCENT VAN GOGH AND A NEW APPROACH TO TRADITIONAL ART PRACTICE* (1996); see DEBORA SILVERMAN, *VAN GOGH AND GAUGUIN: THE SEARCH FOR SACRED ART* 395-399 (2004).

110. See Geller, *Hiroshige v. Van Gogh*, *supra* note 100 and accompanying text.

111. See Woodmansee, *supra* note 57, at 444-47.

112. See *supra* note 108 and accompanying text (quoting letter dated Feb. 1, 1890).

113. See *supra* note 107 and accompanying text (quoting letter dated on or about Sept. 20, 1889).

studying, learning, and teaching.¹¹⁴ These are extensions of a broader knowledge metaphor: van Gogh was seeking knowledge for himself, and he was conscious of extending his knowledge to others. If his words are taken at face value, then van Gogh regarded himself unmistakably as an artist, but his was not art for art's sake, nor creativity for creativity's sake. The bridge between van Gogh's teaching himself and his teaching others is his self-conscious use of the translation metaphor (another derivative of a broader knowledge metaphor), and use of that metaphor in a field-specific or discipline-specific way—as applicable to painters, composers, and those who express art in different media: engravers, lithographers, and so on. One might say that van Gogh regarded himself as the professional teacher, and the “ordinary general public”¹¹⁵ as his students.

One cannot say that this evidence alone would be enough to excuse van Gogh's work as fair use, or to assure that van Gogh's work would be entitled to copyright protection in its own right. A party's testimony concerning the character of his own work may be suspect for a variety of good reasons, even if reasons to doubt van Gogh's sincerity are not apparent here. Other considerations inform copyright judgments, even within the creativity construct. Yet a knowledge law framework seems more persuasive than a creativity law framework in figuring out how this case should be resolved. Van Gogh's letters lay out a multi-part matrix for assessing the legitimacy of what van Gogh was doing—a “what” (a translation of prior work), a “who” (a professional artist), a “how” (interpreting what others produced and teaching it anew), and a “where” (an institutional context)—that is not foreign to how contemporary scholars look at creativity questions and that explicitly and easily maps on to a knowledge framework.¹¹⁶ One might plausibly and persuasively argue that van Gogh's work that “translates” Millet (to use van Gogh's metaphor) is noninfringing and copyrightable, at least in this hypothetical dispute, precisely because the evidence shows that it suits that matrix.

114. *See id.*

115. *See supra* note 106 and accompanying text (quoting letter dated Jan. 13, 1890). In the original, this is “grand public ordinaire,” which has been translated by some as “great general public.”

116. As that matrix is constructed from van Gogh's letters, a theme emerges—multiple and overlapping flows of knowledge from sources to destinations—that echoes a similar theme in modern psychological and sociological studies of creativity and innovation contexts. *See generally* CSÍKSZENTMIHÁLYI, *supra* note 34; JOHN SEELY BROWN & PAUL DUGUID, *THE SOCIAL LIFE OF INFORMATION* 304 (2000) (describing “ecologies” of innovation and innovation in firms).

At the end of Part I above, I offered a series of questions and issues that policymakers, courts, and scholars may use to develop a conceptual vocabulary that builds out the meaning of copyright as knowledge law. More than one hundred years ago, Vincent van Gogh was engaged in a version of that same exercise. A shift from copyright as creativity law to copyright as knowledge law is not only historically justified and normatively desirable. It is accessible even within the authorship-enabled discourse of contemporary copyright in which scholars have situated van Gogh.

III. CREATION, RE-USE, ACCESS, AND DISTRIBUTION AS KNOWLEDGE LAW

Van Gogh and Millet are ancestors of Shepard Fairey and the Associated Press, not in the sense that Fairey is entitled to van Gogh's stature as an artist (or that the Associated Press is entitled to Millet's), but instead in the sense that the conceptual relationship between the two is structured in the same way. Van Gogh was concerned that he would be regarded as a mere copyist with respect to an artist of recognized stature, who van Gogh admired. Fairey is accused of being a mere copyist with respect to a source that is plausibly artistic.

This pattern is not new. Appropriation artists and conceptual artists have been framing these issues for decades.¹¹⁷ Software developers face comparable questions when they engage in verbatim copying of copyrighted computer programs in order to build interoperable programs.¹¹⁸ What has changed is the frequency with which the legal system (and others) encounter the pattern, given the rise of cheap digital technology and its widespread use, and the decay of the conceptual vocabulary that the law has evolved to deal with the pattern in light of technology and practice. The previous Part suggested that copyright as knowledge law offers a useful rubric for

117. To some observers, Shepard Fairey may not be even a conceptual artist; he is, or at least appears to be, a half-step removed from anyone equipped with a laptop computer and a copy of Photoshop. He is not van Gogh because he is everyone, or anyone. To those critics, he is not even Jeff Koons (an artist who is subject to his own share of skepticism), who has at times been highly conscious of the "what is the same" and "what is different" basis of discipline-based art. Because he uses digital tools that are broadly available and because he produces work that, in the eyes of some, could be produced by anyone, Fairey appears to be attitude, rather than meaning; he appears to be the spectre of amateur art. What happens if every person is a potential Koons or Fairey? Or—more plausibly—what happens if we (courts, intermediaries, audiences, and new artists) can no longer tell the difference? The answer may be that the difference no longer matters. But lines still need to be drawn; choices need to be made.

118. See Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1608 (2002).

evaluating van Gogh's defense against a hypothetical claim by Millet. What might that rubric teach regarding Shepard Fairey, and regarding amateurs who cannot claim even Fairey's stature as an artist, let alone van Gogh's?¹¹⁹

The knowledge law construct teaches not to emphasize the distinction between professional and amateur art or artists, as such, and not to favor not-for-profit knowledge contexts over for-profit knowledge contexts (or the reverse) solely on the principle that commercializing and commodifying art is a bad (or good) thing. It teaches that creativity claims are not unimportant but may need to be appreciated alongside other substantive claims regarding the "what?" that copyright should value. The personal vision of an author or creator, and the response of a reader or audience, may be best seen as part of a flow of meaning embedded in various intangible and tangible forms, including objects, rhetorics, and social and business practices. In many fields, subject matter favored by outsiders, amateurs, and hobbyists evolves into new domains of professionalism. In the twentieth century, rock 'n' roll music¹²⁰ and Pop Art¹²¹ are two of the better known domains of professional creativity with roots in outsider or marginal artistic practice.

All of that is preliminary and tentative, and while Shepard Fairey's work offers a timely opportunity to engage this conversation between law and culture,¹²² this Article is not necessarily the best place to conclude it, or even to continue it very far. At the time of this writing, the Fairey litigation is still pending, and its disclosed record is incomplete.

Even if the plaintiff's photograph contains copyrightable elements, Fairey's work should be viewed as a form of fair use. Fairey has created an entirely new subject and object of knowledge—Obama as a subject of mythos (for his supporters), and an object of ridicule (for his opponents).¹²³ In art world terms, Fairey is practicing in a tradition of art based on found material that extends from Duchamp

119. What might it make of service providers and technology developers who facilitate their activities? Though the question is beyond the scope of this Article, copyright as knowledge law holds interesting possibilities for assessing copyright interests of Internet service providers and hosts, libraries, archives, indexers, and search engines. *See, e.g.*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

120. *See* PIERO SCARUFFI, *A HISTORY OF ROCK MUSIC: 1951-2000* (2003).

121. *See* MARCO LIVINGSTONE, *POP ART: A CONTINUING HISTORY* (1990).

122. The conversational metaphor is borrowed from Peter Jaszi. Peter Jaszi, *See Is There Such a Thing as Postmodern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105, 106 (2009).

123. That statement encompasses not only Fairey's perspective, and that of his intended audience, but also the perspective of an objective observer. Which of these is relevant, and when, is something that a knowledge critique of copyright would have to work out.

to Warhol, Koons, and Hirst.¹²⁴ In doctrinal terms, as a species of knowledge law, Fairey's case is perhaps closest to *Gaylord v. United States*,¹²⁵ in which the owner of a copyright in a public sculpture sued the United States Postal Service for using an image of the sculpture on a stamp. The Court of Federal Claims found that the use constituted a noninfringing fair use, in large part because the Postal Service, having used a photograph of the statue that included some snow-covering and having engraved the image in order to produce the stamp, "changed Mr. Gaylord's sculpture to create a new, surrealistic vision."¹²⁶ There is a hint in that phrase of a flow of meaning, of ways of knowing the world, among the sculptor (Gaylord), the intermediaries (the photographer, the Postal Service), and the ultimate audience (stamp users).¹²⁷ Fairey seems to offer a claim that resembles this argument, facilitating a flow of ways of knowing the world, with respect to then-Senator Obama and his supporters and critics. It is difficult to say more at this stage, either with respect to Fairey's claim or with respect to the vision of fair use at which the lower court in *Gaylord* hinted. To the extent that court spoke indirectly in terms of copyright as knowledge law, it offered little guidance to lawyers, scholars, future judges, and least of all individuals, groups, and firms regarding how to express the fair use of knowledge (or the absence of fair use) in terms of legal rhetoric. A more evolved doctrine of fair use as part of knowledge law would articulate in more detail the types of evidence that would be relevant in establishing or rejecting the application of the doctrine—the sources, practices, communities, and attributes of meaning that would supplement the law's current focus on the plaintiff's and defendant's works and their markets. Without that pragmatic detail, copyright as

124. Jeff Koons's use of found material in his own art has been the subject two well-known and widely-discussed opinions of the Second Circuit, the first finding that Koons's work infringed, the second finding that it constituted fair use. *Compare* *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (finding that Koons's "String of Puppies" sculpture infringed Art Rogers's copyright in his photograph "Puppies"), *with* *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (finding that Koons engaged in fair use when incorporating a portion of Andrea Branch's photograph of a woman's legs into a larger collage). Peter Jaszi suggests that different treatments of Koons may reflect evolving cultural understandings of conceptual art. *See* Jaszi, *supra* note 122, at 116-17.

125. 85 Fed. Cl. 59 (2008), *aff'd in part, rev'd in part, and remanded*, 595 F.3d 1364 (Fed. Cir. 2010).

126. *Id.* at 69.

127. *See supra* note 92 and accompanying text (raising the question of art as knowledge in the context of copyright as knowledge law).

knowledge law runs a risk of being as conclusory and unhelpful in practice as copyright as creativity law.¹²⁸

Fair use cases are obvious candidates for re-examination under copyright as knowledge law. A more challenging and interesting example is *Bridgeman Art Library, Ltd. v. Corel Corp.*,¹²⁹ in which exact reproductions of public domain paintings, marketed as transparencies and CD-ROMs, were held not to be copyrightable in a case brought against a commercial copyist. The court concluded that the plaintiff's works did not manifest the requisite originality as derivative works, because there was no evident distinguishable variation between the source and the reproductions:

In this case, plaintiff by its own admission had labored to create "slavish copies" of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality—indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity.¹³⁰

The plaintiff's reproductions were, in effect, so good that they reflected supreme technical skill, but no creativity.

Bridgeman has been the subject of extensive commentary, the best of which has expressed strong sympathy for all of the multiple interests at stake: museums and other art historical institutions that have both commercial and scholarly interests at stake in producing and distributing art reproductions, and scholars and the public who ought not to have access to public domain works foreclosed because of modern copyrights claimed in exact reproductions.¹³¹ Whether or not the outcome is defensible on the merits, its rhetoric and argumentative structure are discomfiting. The rejection of "slavish copying" as a basis for a copyright claim has support in precedent. The reference stems in part from the rejection of a claimed copyright

128. The fragility of a thin conception of copyright as knowledge law is illustrated by the opinion of the Federal Circuit in *Gaylord*. The Court of Appeals specifically rejected the lower court's finding that the stamp produced a distinct surrealistic character. In the court's words, "[c]apturing The Column on a cold morning after a snowstorm--rather than on a warm sunny day--does not transform its character, meaning, or message. Nature's decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude." *Gaylord v. United States*, 595 F.3d 1364, 1374 (Fed. Cir. 2010). That quotation speaks in terms of copyright as creativity law. To recast the court's judgment slightly, the defendant had not demonstrated the presence of creativity in its work that was sufficient to outweigh the plaintiff's property right in his own creativity.

129. 25 F. Supp. 2d 421 (S.D.N.Y. 1998) [hereinafter *Bridgeman I*].

130. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) [hereinafter *Bridgeman II*].

131. See R. Anthony Reese, *Photographs of Public Domain Paintings: How, if at All, Should We Protect Them?*, 34 J. CORP. L. 1033 (2009) (proposing a limited sui generis property right applicable to art reproductions, but expressing skepticism that such a right would pass constitutional muster).

on that ground in *L. Batlin & Son, Inc. v. Snyder*¹³²—but is both oddly moralistic and inconsistent with credible artistic interests.¹³³ Would framing the case in terms of copyright as knowledge law lead to a more plausible and persuasive result, if not necessarily a different one?

Bridgeman, as the court presented it, unfolded as follows. The plaintiff began with two-dimensional works of fine art: paintings, which were in the public domain.¹³⁴ Despite their public domain status, copyright law commands a conceptual distinction of intangible idea from intangible expression in each of those paintings. The latter constitutes the creativity produced by the painting's author. By creating high-quality reproductions of the paintings, Bridgeman copied that intangible expression verbatim. The author's creativity was entirely unchanged in the move from canvas to photograph and CD-ROM. The change of medium made no creative difference. As the court noted, "production of a work of art in a different medium cannot by itself constitute the originality required for copyright protection."¹³⁵ That proposition is consistent with a bedrock copyright concept, that the copyright exists independent of any material form in which the work is fixed.¹³⁶ With no creativity, there was no originality; with no originality, there was no copyright.

How might this be reframed? Begin with the original work of authorship, which, implicitly, is unchanged in the transition from one medium to another. It is characteristically assumed by copyright lawyers and scholars and by judges in copyright cases that this work of authorship is entirely intangible, though specific support for that assumption appears neither in the Copyright Act nor in the United States Constitution.¹³⁷ Copyright law does not define the concept of

132. 536 F.2d 486 (2d Cir. 1976).

133. The moralistic tone carried by the phrase "slavish copying" is no accident. The first reported use of the phrase took place in a district court opinion that granted an injunction on unfair competition grounds against the producer of a "return post card folder" that copied an identical product originated by the plaintiff. See *Correct Printing Co. v. Ramapo River Printing Co.*, 16 F. Supp. 573, 575 (S.D.N.Y. 1936).

134. Presumably, most, if not all, of these painting were never protected by copyright in the first place. The plaintiff relied in part on a certificate of registration in a work collecting its digital images entitled *Old World Masters I. Bridgeman I*, 25 F. Supp. 2d at 424.

135. *Bridgeman II*, 36 F. Supp. 2d at 196 (quoting *Past Pluto Prods. v. Dana*, 627 F. Supp. 1435, 1441 (S.D.N.Y. 1986)).

136. 17 U.S.C. § 202 (2006) ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.").

137. See, e.g., Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. F. 62 (2009) ("Intangibles like works of authorship can be extensively shared without damage to the owners, which is not as true of tangibles.").

the work of authorship.¹³⁸ It is, in fact, largely a product of the authorship development of the nineteenth century,¹³⁹ meaning that its current role in copyright analysis is at most statutory, rather than constitutional. A work of authorship is embodied in material objects called copies, which leads to the conclusion that works of authorship are intangible and copies are tangible. Yet, there is no logical inconsistency between the idea of a tangible work of authorship, that is, a work that the author or creator has created with the hand rather than the head, and a copy that embodies that work. Even the definition of pictorial, graphic, and sculptural works, which appears to require separating intangible expressive features of three-dimensional and two-dimensional graphical works from their physical forms, does not exclude the possibility of tangible works of authorship.¹⁴⁰

Treat the original paintings as knowledge objects. Adopt some of the sense of van Gogh's reference to teaching and learning through his art as well as the premise that knowledge itself is embodied in tangible as well as intangible things.¹⁴¹ Does transferring those paintings into different media, in order to effect their publication and distribution (and commercialization) to new or different audiences, advance a related teaching and learning goal? It might be argued that such a change of medium does precisely that; if so, the conclusion would follow that there is copyrightable originality in *Bridgeman's* transparencies. That conclusion would require rolling back not only the rejection of the "slavish copying" principle cited in *Bridgeman*, with its evocation of the idea that "slavish" copying is inherently value-less, but also the dictum in *Feist* that originality consists of a form of creativity. A less dramatic turn would take that argument to the same conclusion that the district court reached in *Bridgeman*: that *Bridgeman* owns no protectable copyright interest in its transparencies. The judgment might rest not on the proposition that there is no creativity evident in the transparencies, and instead might rest on the proposition that the process of producing the transparencies evidences valuable knowledge that belongs not in the copyright system but perhaps—given its technical character—in the

138. That omission is the source of growing anxiety among scholars. See Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575, 576 (2005).

139. See Woodmansee, *supra* note 57. On the development of the concept of the "work of authorship" in the nineteenth century as the locus of copyright analysis, see Bracha, *supra* note 22.

140. See 17 U.S.C. § 101 (2006) ("Pictorial, graphic, and sculptural works' . . . shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.").

141. See *supra* note 30 and accompanying text.

patent system. Looking at *Bridgeman* as a case of knowledge law could align it, in other words, with cases such as *Baker v. Selden*.¹⁴² Selden's bookkeeping text was held to be uncopyrightable subject matter, but Selden's bookkeeping method, the Supreme Court noted, might have been entitled to a patent.¹⁴³ That conclusion would have the added benefit of assuring *Bridgeman* and other producers of art reproductions a return sufficient to justify their investment in this product.

IV. CONCLUSION AND IMPLICATIONS

I have argued that copyright is dominated by a conceptual construct, copyright as creativity law, which has exhausted whatever ability it may have had to supply lawyers and policymakers with a vocabulary adequate to differentiate persuasively between the kinds of things that copyright law should value and those things that copyright law should not. This challenge is particularly evident in the context of amateur art. Amateur creators are authors in copyright terms; they are also users and consumers. The vocabulary of creativity limits the ability of the copyright system to differentiate between plausible claims of fair use and ordinary consumption, for example, and between copyrightable and uncopyrightable production of new works. Scholars have sought to refine creativity in copyright in a variety of ways. This has offered a supplemental construct, copyright as knowledge law, which offers a historically valid and normatively justifiable route to developing and supplying a better vocabulary altogether. Surprisingly, at least some support for the proposal is found in the writings of Vincent van Gogh, who is widely regarded as the kind of creative genius to whom the system's creativity construct is addressed.¹⁴⁴

Copyright as knowledge law offers risks and costs as well as potential benefits. Is it feasible to adapt copyright as knowledge law? Constitutional law might pose an obstacle. *Feist* puts originality front and center in copyright law as a matter of constitutional law. As a result of that case, it is difficult to conceive of originality expressed in terms of knowledge rather than in terms of creativity. Yet the constitutional provision that supports copyright law also supports

142. 101 U.S. 99 (1879).

143. See *id.* at 103. The status of related, modern business method patents is under review by the Supreme Court. See *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008) (en banc) (limiting scope of patentable subject matter in the business method context), petition for cert. granted sub. nom. *Bilski v. Doll*, 129 S. Ct. 2735 (2009).

144. See BOYLE, *supra* note 90.

patent law,¹⁴⁵ and the latter is unambiguously a knowledge-driven body of law. So long as the Intellectual Property Clause of the Constitution is read as an integrated statement, a reading that is justifiable based on the most recent research into its origins,¹⁴⁶ the Constitution should be no obstacle to my claim here. Artists and artistic communities whose identities, discourses, and practices depend heavily on explicit ideologies of creativity would face the challenging (though hardly insuperable) task of articulating those ideologies in terms of knowledge; lawyers, judges, and policymakers who are engaged with those communities would face the same task. At the same time, the existence of that challenge implies that there should be an opportunity to disengage creativity from copyright. Some scholars now argue that the breadth of creative practice demands precisely such a careful approach to copyright law.¹⁴⁷ Would relying on copyright as knowledge law pose a threat of inscribing a hierarchy of expression and information that would undermine, rather than enhance, the normative benefits of knowledge? Perhaps.

Yet my argument does not require a return to an older, hierarchical system. Nor do I suggest that “everyman” or “everywoman” or “collaboratives” and “collectives” cannot be sources and stewards of knowledge in meaningful and legally significant ways—or that anyone or any group necessarily is such a source or steward. I do argue that in the current *Feist*-encouraged environment of copyright as creativity law, law and digital culture lack the kinds of markers to help identify and sort the teachers from the learners that were easier to come by and interpret in the analog world of unique (or more unique) artifacts—the sorts of markers that an artist (and art lover) such as van Gogh may have taken more or less for granted. Putting knowledge in the center of these issues offers policymakers and scholars a number of potential advantages over a sole focus on creativity. Because those advantages may or may not be realized, I characterize them as implications.¹⁴⁸

145. See U.S. CONST. art. I, § 8, cl. 8.

146. See Oliar, *supra* note 46.

147. See, e.g., Tushnet, *supra* note 22.

148. Even if copyright as knowledge law were treated as a grand thought experiment, its unexpected nature makes the exercise worthwhile. Knowledge bears thinking about, and rethinking. Borges reported on “a certain Chinese encyclopedia entitled *Celestial Emporium of Benevolent Knowledge*” which recorded that

animals are divided into (a) those that belong to the Emperor, (b) embalmed ones, (c) those that are trained, (d) suckling pigs, (e) mermaids, (f) fabulous ones, (g) stray dogs, (h) those that are included in this classification, (i) those that tremble as if they were mad, (j) innumerable ones, (k) those drawn with a very fine camel’s hair brush, (l) others, (m) those that have just broken a flower vase, (n) those that resemble flies from a distance.

Copyright as knowledge law suggests the following implications. The first is that it offers a natural foundation for aligning individualistic perspectives on intellectual property law¹⁴⁹ with institutional perspectives. Those two perspectives are often viewed as being in tension with each other, particularly if creative people, framed as complex, autonomous beings, are contrasted with firms, framed as economic constructs.¹⁵⁰ A useful integration of the two perspectives situates individuals in an institutional context, giving primacy to neither as an analytic starting point. Forms of knowledge are often closely aligned with specific institutional settings. Science, scientific research, scientists, and disciplines and organizations dedicated to scientific research are among the best known, as an example that is usually linked to patent law. Fine art, fine artists, curators, art historians, and museums offer an example that is linked closely to copyright. New and emerging institutions, and dynamic institutions, are increasingly parts of the setting of intellectual property law and policy.¹⁵¹ Copyright as knowledge law opens the door to investigating and understanding their virtues and drawbacks as actors in themselves.

The second implication of copyright as knowledge law is that it opens the door to exploring the “who?” of copyright, along with the related “how?” and “why?” of copyright, as part of a matrix of questions that is coupled with a meaningful inquiry into the “what?” of copyright. I began this Article with the argument that creativity offers an unhelpful set of “what?” questions in copyright law, leading to an equally unhelpful emphasis on “who?” questions to the exclusion of other topics.¹⁵² Knowledge as copyright’s “what?” requires investigating that “what?,” rather than ignoring it.

The third and final implication of copyright as knowledge law is that it enables legitimate inquiries into both the processes of knowledge production and distribution (among other things) and into

Jorge Luis Borges, *The Analytical Language of John Wilkins* (1942), reprinted in OTHER INQUISITIONS: 1937-1952, at 101, 103 (Ruth L. C. Simms trans., University of Texas Press 1964).

149. See *supra* note 18 (describing individualistic perspectives found in the work of Professors Benkler and Cohen).

150. Compare ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* (2009) (offering a thorough defense of legal protection for the spiritual dimension of human creativity), with Dan L. Burk & Brett H. McDonnell, *The Goldilocks Hypothesis: Balancing Intellectual Property Rights at the Boundary of the Firm*, 2007 U. ILL. L. REV. 575 (2007) (describing the impact of intellectual property rights on the “make or buy” decision that characterizes the boundary of the classic firm).

151. See, e.g., Madison, Frischmann & Strandburg, *supra* note 94 (proposing an institutional framework for analyzing “cultural commons”).

152. See *supra* notes 21-28 and accompanying text.

knowledge products themselves. Inquiries into the processes of creativity have, until recently, been suspect,¹⁵³ and recent explorations of the sources of creativity have tried, in large part, to peer into the creator's soul, or at least into the creator's heart.¹⁵⁴ As philosophy, psychology, and sociology, this approach to source is interesting in the abstract. As a foundation for law and policymaking, it is at least incomplete, because it does not take account of other legitimate interests at work in the copyright system, and at worst it is unhelpful, because it runs the risk of focusing law and policy excessively on outcomes that are internal to individuals and insufficiently on outcomes that are external, in society. Copyright as knowledge law should direct policymakers and analysts to focus on the external manifestations of human behavior, both individually and collectively, rather than on internal questions of motivation and belief. Administratively, this simplifies the costs of copyright as a legal system; policymakers, copyright litigants and judges can limit the scope of expensive investigations into the psychic motivations for and benefits of creativity as bases for copyright rules and judgments. Normatively, it points to the benefits of knowledge law in terms of making the world a better place as well as making all of us better people.

153. See *supra* notes 15-16 and accompanying text (describing how copyright law usually treats the work itself as the best evidence of its creativity).

154. See KWALL, *supra* note 150; Tushnet, *supra* note 22.

